Supreme Court, U.S.
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No. 14-857

IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL BLACK CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The *amicus curiae* addresses the second of the three questions presented in this case:

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.

2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified.

3. Whether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for government contractors is restricted to claims arising out of property damage caused by public works projects.

RULE 29.6 STATEMENT

Amicus curiae National Black Chamber of Commerce has no parent company, and no publicly held company owns 10 percent or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Black Chamber of Commerce is a nonprofit, nonpartisan organization dedicated to the economic empowerment of African-American communities through entrepreneurship. Incorporated in 1993, it represents nearly 100,000 African-American-owned businesses and advocates on behalf of the 2.1 million Black-owned businesses in the United States. The Chamber has 190 affiliated chapters located throughout the nation, as well as international affiliates in, among others, the Bahamas, Brazil, Colombia, Ghana, and Jamaica. The Chamber regularly files *amicus curiae* briefs in cases like this one that raise issues of concern to the nation's Black business community.

INTRODUCTION AND SUMMARY OF ARGUMENT

The *amicus curiae* agrees with the petitioner that an offer of complete relief that fully satisfies a plaintiff's claims eliminates that plaintiff's personal stake in litigation and therefore renders her case moot. That result is not and cannot be altered by the mere presence of class allegations, for three reasons.

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[1]Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

First, no source of law gives named plaintiffs a substantive right to pursue class claims. To the contrary, the Rules Enabling Act specifically precludes federal procedural rules from enlarging substantive rights, and Rule 23 is consistent with the Act, establishing procedures for aggregate litigation without altering the substantive rights or obligations of any party. Nonetheless, the contrary conclusion of the dissenting opinion in *Genesis Healthcare v. Symcyzk*, 133 S. Ct. 1523 (2013), although unsupported by any reasoning or precedent, has proven persuasive to many lower courts. Correction of this mistaken view of the law is necessary to give proper effect to Congress's careful delineation of money-damages provisions in remedial statutes like the the Telephone Communications Protection Act that were framed with individual enforcement in mind.

Second, application of the "relation-back" doctrine would be inappropriate and unnecessary here. While the Court's decisions do allow the claims of a class whose certification has already been adjudicated to survive the subsequent mootness of the named plaintiff's claims in certain limited circumstances, the named plaintiff here had not even moved for certification at the time his claim was mooted. Moreover, the policy rationales underlying the "relation-back" doctrine are not implicated. The claims at issue here are not the kind of inherently transitory claims that might otherwise prove unreviewable, and settlements with individual plaintiffs would fur-

ther, rather than retard, Congress's purposes in providing a remedy to individual injured parties.

Finally, any result other than dismissal of this action for want of a live controversy would raise serious constitutional concerns under Article III similar to those that motivated the Court's decision to hear *Spokeo, Inc. v. Robins*, No. 13-1339. A named plaintiff whose own claim has been extinguished by an offer of complete relief lacks both the injury in fact and related remedy that are requisite to Article III adjudication. Such a plaintiff may not, of course, rely on the interests of third parties (*i.e.*, putative class members) or byproducts of the litigation itself (*e.g.*, the prospect of an incentive award) to provide a live controversy. Particularly in these circumstances, enforcement of Article III's requirements is important to restrict class actions to actual controversies involving the interests of the plaintiffs whom Congress sought to protect, rather than hypothetical disputes implicating only the interest of plaintiffs' attorneys in extracting windfall fee awards.

For these reasons, and those contained in the petitioner's brief, the decision of the court of appeals should be reversed.

ARGUMENT

I. Named Plaintiffs Have No Substantive Right to Pursue Class Claims

Class allegations do not create a substantive right to pursue class claims. The recognition of such a right cannot be squared with the Rules Enabling Act or the text and history of Rule 23, much less this Court's decision in *Genesis Healthcare Corp. v. Symcyzk*, 133 S. Ct. 1523 (2013). Unfortunately, the contrary conclusion of the dissent in *Genesis Healthcare* has led more than a few lower courts astray on this point. *See id.* at 1536 (Kagan, J., dissenting). The Court should correct that mistaken view.

A. Rules Promulgated Pursuant to the Rules Enabling Act Cannot Confer on a Named Plaintiff the Substantive Right to Pursue Class Claims

The Rules Enabling Act could not be clearer that rules promulgated pursuant to its authority "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). What this means is that rules must "really regulat[e] procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 14 (1941). The governing test is therefore "what the rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is val-

id; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality op.) (quoting *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 446 (1946)).

As a plurality of the Court explained in *Shady Grove*, the *sine qua non* of a permissible procedural rule is that, while it may regulate "the process for enforcing [the parties'] rights," it does not "alter[] the the rights themselves, the available remedies, or the rules of decision by which the court adjudicated either." *Id.* at 407–08 (surveying cases).

The view that Rule 23 allows a named plaintiff whose own claim is moot to seek remedies on behalf of putative class members fails that test, in two respects. To begin with, empowering a named plaintiff in a class action to proceed despite the absence of any continuing personal interest she may have in the litigation necessarily "alter[s]...the rights themselves." If a plaintiff's own claims are moot, any right to recovery on those claims she may have had is necessarily extinguished. *Spencer v. Kemna*, 523 U.S. 1, 18 (1998) ("[M]ootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so."). Allowing a plaintiff to nonetheless continue the litigation, notwithstanding the mootness of her own claims, depends on the assumption that the plaintiff has some legally cognizable interest—that is, a right—in the claims of putative class members.

Ashcroft v. Mattis, 431 U.S. 171, 172–73 (1977).[2] But that is precisely the kind of substantive right that the Rules Enabling Act precludes rules from conferring. Likewise, if recognizing a named plaintiff's interest in others' claims is somehow sufficient to deflect a mootness challenge, then it also impermissibly alters the remedies available to that plaintiff.

A comparison with the challenge to application of Rule 23 in *Shady Grove* is instructive. Rule 23's authorization of class actions to enforce state law not subject to class litigation in state court was properly procedural, the plurality opinion found, because, "like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged." 559 U.S. at 408. By contrast, the application of Rule 23 at issue here would allow a named plaintiff to avoid dismissal due to the failure of her own claim. In other words, the rule of decision is so significantly altered that the decision is precisely the reverse. That shift is not one that could be fairly described as procedural.[3]

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[2] Of course, such a plaintiff would not have a legally cognizable interest. *Mattis*, 431 U.S. at 173 (holding claim moot after resolution of damages claim because "[e]motional involvement is a lawsuit is not enough to meet the case-or-controversy requirement").

[3] It should be noted that the approach taken by the concurring justice in *Shady Grove* is identical in all respects material to the instant case. *See* 559 U.S. at 410–11 (explaining disagreement with concurrence); *id.* at 418–20 (Stevens, J., concurring) (arguing that, to determine whether a federal rule "enlarges"

In sum, the proposition that Rule 23 confers a right to pursue class claims, or otherwise alters the mootness inquiry in these circumstances, is incompatible with the Rules Enabling Act's bar on enlargement of substantive rights.

B. Rule 23 Provides No Substantive Right To Pursue Class Claims

Consistent with the Rules Enabling Act, Rule 23 does not create any substantive rights for plaintiffs to assert putative class claims. Rule 23 does no more than potentially allow large numbers of plaintiffs—all with actual standing and who satisfy the procedural requisites—to aggregate their claims in a single action. In other words, it "merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove*, 559 U.S. at 408.

The non-substantive character of Rule 23 is apparent in its text. Rather than confer any right, it provides only that, in certain circumstances, "members of a class may sue or be sued as representative parties." Fed. R. Civ. P 23(a). Indeed, far from conferring additional rights on representative parties, it places burdens on them, requiring most basically

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substantive rights under state law, a court ought first to consider whether the allegedly conflicting state law is procedural or substantive in nature).

that they "fairly and adequately protect the interests of the class" as well as do other specific things. Fed. R. Civ. P. 23(a)(4). Nowhere does it so much as imply that a representative party has an interest in other class members' claims; to the contrary, it recognizes, and requires courts to take into account, other "class members' interests in individually controlling the prosecution or defense of separate actions." Fed. R. Civ. P. 23(b)(3)(a).

The Rule's non-substantive character was by design. The current approach to "common question" class actions was conceived as part of the 1966 Amendments to the Federal Rules of Civil Procedure as procedural means to enable the mass joinder of individual claims—and nothing more. The Advisory Committee took that view when it formalized class litigation by drafting Rule 23. Its object was not to create a class action cause of action but rather to provide "advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party." Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (i), 81 Harv. L. Rev. 356, 390 (1967). *See also Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (holding "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims" because that would alter the defendant's substantive rights). After all, it was understood that "[t]he interests of individuals in conducting separate

lawsuits may be so strong as to call for denial of a class action." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 616 (1997) (quoting Adv. Comm. Notes, 28 U.S.C. App., p. 698).

Accordingly, the Court's reasoning in *Genesis Healthcare* regarding the Fair Labor Standards Act's similar collective-action procedure is fully applicable to class actions under Rule 23. While Rule 23, like Section 16(b) of the FLSA, 29 U.S.C. § 216(b), authorizes a plaintiff to bring an action on behalf of herself and others similarly situated, "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." 133 S. Ct. at 1529. That is because the plaintiff, when her own individual claim becomes moot, "lack[s] any personal interest in representing others in this action." *Id.* To be sure, "a class action is not rendered moot when the named plaintiff's individual claim becomes moot after the class has been duly certified," but that rule does not save the named plaintiffs' claim and, in any instance, turns on "the fact that a putative class acquires an independent legal status once it is certified." *Id.* at 1350.

Nonetheless, the court below distinguished *Genesis Healthcare* on the sole ground that it arose under the collective action procedures of FLSA, whereas Rule 23 solely governs the class procedures here. Pet. App. 6a–7a. But this is a distinction without a difference, because neither Section 16(b) nor Rule 23 confers the right to prosecute someone else's claim—

much less those of an entire class. Indeed, in that respect, the congruence between the two forms of action is a close one. Congress expressly rejected such representative FLSA actions in 1947.[4] Similarly, as described above, the Rules Enabling Act bars such an application of Rule 23.

Were there any doubt regarding that result, it should be put to rest by the application of Rule 23's requirements that putative class representatives possess claims "typical of the claims...of the class" and be positioned so as to "fairly and adequately protect the interests of the class." Fed. R. Civ. P 23(a)(3), (4). In recognition of the interests and rights of class members who may find themselves bound by a judgment or settlement, "[a] class representative must be part of the class and possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U. S. 395, 403 (1977) (quotation

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[4] The substantive rights contained in the FLSA's Section 16(b) do not include the right to representative actions. In 1947, Congress amended Section 16(b) in the Portal-to-Portal Act. Pub. L. No. 80-49, § 5, 61 Stat. 84, 87–88 (1947). These amendments added the opt-in requirement and repealed a provision in Section 16(b) "permitting an employee or employees to designate an agent or representative to maintain an action for and in behalf of all employees similarly situated." H.R. Rep. No. 80-326, at 13 (1947). These changes had "the purpose of limiting private FLSA plaintiffs to employees who asserted claims *in their own right* and freeing employers of the burden of representative actions." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (emphasis added).

marks omitted). But a named plaintiff whose claims have already been satisfied stands in a very different position than putative class members, having no incentive to maximize compensation to the class. A named plaintiff whose own claim has been mooted is therefore not appropriately "typical" and cannot be presumed to be an adequate class representative. *See Amchem*, 521 U.S. at 625–26. To the contrary, "[s]uch a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). Rule 23, of course, must be interpreted and applied consistent with the constitutional imperative of due process to forbid that result.

Thus, Rule 23 and Section 16(b) of the FLSA both permit mass joinder of similarly situated claims—but only when all plaintiffs have viable claims. Neither, however, allows a named plaintiff whose claim has been mooted to stand in for other class members who may or may not be injured. Stated differently, there is no substantive right to a class procedure under either Rule 23 or the FLSA. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980) ("the right to represent a class" is "a procedural claim"); 5-23 Moore's Federal Practice–Civil § 23.02 ("The class-action suit is a procedural device for joining parties. It permits single-action litigation of multiple claims involving similar or identical questions

of fact and law that arise from a common set of operative facts.").

In sum, class litigation is not an end in itself. "It is simply a device to vindicate the rights of individual class members." *Sykes v. Mel S. Harris and Associates LLC*, 780 F.3d 70, 102 (2d Cir. 2015). Straightforward application of that principle controls the result here.

C. The Contrary Conclusion of the Dissent in *Genesis Healthcare* Has Led Lower Courts Astray

The dissenting opinion in *Genesis Healthcare* loses sight of that principle, concluding that representative parties (at least under Section 16(b) of the FLSA) do have a right to assert others' claims. In particular, it asserts that "a judgment satisfying an individual claim does not give a plaintiff like Smith, *exercising her right to sue on behalf of other employees*, 'all that [she] has...requested in the complaint (i.e., relief for the class).'" *Genesis*, 133 S. Ct. at 1536, (Kagan, J., dissenting) (quoting *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring)) (emphasis added). It is the plaintiff's choice, the opinion continues, "and not the defendant's or the court's, whether satisfaction of her individual claim, without redress of her viable classwide allegations, is sufficient to bring the lawsuit to an end." *Id.*

Not only is this view indefensible with respect to FLSA collective actions—the dissenting opinion

simply asserts this result, without any support or reasoning—but it has even less currency with respect to class actions under Rule 23. It could at least be argued that, under the FLSA, Congress might have intended to give plaintiffs a right to proceed collectively. *See id.* (quoting *Hoffmann–La Roche*, 493 U.S. at 170). But no such argument can be made under the Rules Enabling Act, which expressly rejects any such contention. *See supra* § I.A.

That has not, however, prevented lower courts from following the approach of the *Genesis Healthcare* dissent to hold that unaccepted Rule 68 offers of judgment do not render a named plaintiff's class claims moot. *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 954–55 (9th Cir. 2013); *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 704 (11th Cir. 2014) (relying substantially on *Genesis* dissent to hold that "[e]ven if the individual claims are somehow deemed moot, the class claims remain live, and the named plaintiffs retain the ability to pursue them."); *Boucher v. Rioux*, No. 14-CV-141-LM, 2014 WL 4417914, at *3 (D.N.H. Sept. 8, 2014) ("Post-*Genesis* jurisprudence in both the circuit courts and the district courts has taken a favorable view of Justice Kagan's dissent."); *Yaakov v. ACT, Inc.*, 987 F Supp. 2d 124, 128 (D. Mass. 2013) (relying on *Genesis* dissent to hold that a plaintiff seeking to represent a class should be permitted to accept an offer of judgment on her individual claims under Rule 68, receive her requested individual relief, and have the case dismissed, or reject the offer and pro-

ceed with the class action."); *Sandusky Wellness Ctr. LLC v. Medtox Scientific*, Inc., No. CIV 12-2066 DSD/SER, 2013 WL 3771397, at *2 (D. Minn. July 18, 2013) ("To moot the claim of a putative class representative, a Rule 68 offer must provide complete relief for both the individual and class claims."); *Delgado v. Castellino Corp.*, 66 F. Supp. 3d 1340, 1344 (D. Colo. 2014) ("Moreover, the Court finds certain aspects of Justice Kagan's dissent in *Genesis* persuasive. An Offer of Judgment that addresses only the relief attainable by an FLSA plaintiff in an individual capacity does not grant that plaintiff all of the relief that the FLSA permits, such that dismissal on mootness grounds is appropriate."); *Collado v. J. & G. Transp., Inc.*, No. 14-80467-CIV, 2014 WL 6896146, at *2 (S.D. Fla. Dec. 5, 2014) ("Essentially, Rule 23 provides a unique procedural tool granting a named plaintiff the right to act as a 'private attorney general' to vindicate the rights of a broader class of yet-unnamed plaintiffs.").

By adopting the *Genesis Healthcare* dissent's rationale, these and other courts have run roughshod over the limitations of both the Rules Enabling Act and Rule 23 itself. Their error in confusing procedural mechanisms for substantive rights requires correction.

D. Recognition of a Right To Pursue Class Claims Would Undermine Congress's Careful Delineation of Individual Remedies

Correction of lower courts' errant decisions recognizing a right to pursue class claims is necessary to carry out congressional policy in an additional respect, beyond enforcing the Rules Enabling Act.

When courts give substantive impact to the procedural mechanisms of Rule 23 (or FLSA Section 16(b)), they warp the individual rights contained in the underlying substantive laws. Substantive laws that provide private remedies are typically designed to be enforced on an individual basis. Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal. F. 71, 75 (2003) (substantive remedial laws "are designed to make the private victim whole by obtaining compensation" from the wrongdoer). Allowing freestanding class claims, divorced from any individual injury, transforms those limited damages remedies into offensive weapons that defendants are powerless to settle according to the statutory terms. In effect, the claimed right to pursue class claims becomes a right to extort high-value settlements, far in excess of anything that Congress intended.

To the contrary, as with many remedial schemes, Congress anticipated that the Telephone Consumer Protection Act would be enforced primarily on an individual basis, with a low-value statutory damages

claim to remedy the commensurately minor injury of unwanted communications. The statute provides for a maximum recovery of $500 for each violation as well as treble damages if the plaintiff can prove willful or knowing violation. 47 U.S.C. § 227(b)(3). "This most likely exceeds any actual monetary loss...suffered by most plaintiffs in such a case." *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Pa. 1995).

The TCPA's supporters in Congress anticipated that individual actions would be the prevailing means of enforcement: "[I]t is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court.... However it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than potential damages." 137 Cong. Rec. 30821–22 (1991) (Statement of Sen. Hollings) (explaining the private right of action provision). The statutory remedy is designed to provide adequate incentive for an individual plaintiff to bring suit on her own behalf.

Yet cases like this one have precious little to do with the individuals for whom Congress sought to provide relief. Instead, class litigation is typically a choice made by class counsel. "[A]s a practical matter, it is the private attorneys who initiate suit and who are the only ones rewarded for exposing the defendants' law violations." Redish, 2003 U. Chi. Legal. F. at 75. And when there is not even a single plaintiff with a live personal claim, the attorneys answer

to no one but themselves, seeking windfalls where Congress provided for modest compensation. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 882–83 (1987) (discussing opportunistic conduct by class counsel).

The requirement of an actual, live controversy is not a perfect check on potential abuses of the class-action mechanism, but it serves at least to address suits lacking any real controversy other than the amount of attorneys' fees to be paid.

II. The "Relation-Back" Doctrine Is Inapplicable When the Named Plaintiffs' Claim Is Mooted by an Offer of Complete Relief

The judicially-created "relation-back" doctrine is inapplicable here, with respect to offers of complete relief to Rule 23 named plaintiffs, for the same reasons that the Court held it to be inapplicable to FLSA plaintiffs in *Genesis Healthcare*. *See* 133 S. Ct. at 1530–31.

Sosna v. Iowa, 419 U.S. 393 (1975), stands for the proposition that, where a legal controversy would otherwise evade review due to its transient nature, "a class action is not rendered moot when the named plaintiff's individual claim becomes moot after the class has been duly certified." *Genesis Healthcare*, 133 S. Ct. at 1530. That case, for example, involved a challenge to an Iowa statute requiring one year's in-

state residency prior to filing a petition for divorce, such that any individual claim would surely be mooted during the course of litigation. 419 at 395–96. In *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 336–37 (1980) and *United States Patrol Commission v. Geraghty*, 445 U.S. 388, 404 & n.11 (1980), the Court narrowly extended *Sosna's* rule to situations where class certification had been *adjudicated* prior to the mooting of the representative's claim.

Sosna, however, took pains to note the self-limiting character of its rule: "the same exigency that justifies this doctrine serves to identify its limits. In cases in which the alleged harm would not dissipate during the normal time required for resolution of the controversy, the general principles of Art. III jurisdiction require that the plaintiff's personal stake in the litigation continue throughout the entirety of the litigation." 419 U.S. at 402. And subsequent cases maintained that limitation. *E.g.*, *Geraghty*, 445 U.S. at 398.

The present case neither satisfies the rule nor implicates the underlying policy concerns of *Sosna* and its progeny. The plaintiff's claim became moot before the district court made any ruling on certification. Pet. App. 5a. Thus, as in *Genesis Healthcare*, relation-back is categorically unavailable "because the Court explicitly limited its holding to cases in which the named plaintiff's claim remains live at the time the district court denies class certification." 133 S. Ct. at 1530.

There is no cause to depart from that bright-line rule because settlement offers do not implicate the the "inherently transitory" rationale that has justified application of the relation-back doctrine. That "rationale was developed to address circumstances in which the challenged conduct was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." *Id.* at 1351. But, just as the Court observed in *Genesis Healthcare*, "this doctrine has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy," *id.*, and the defendant's action to provide the named plaintiff with complete relief is the only basis for mootness here. And unlike the injunctive-relief claim in *Sosna*, the claims here will not become moot on their own, merely through passage of time. Accordingly, relation-back is no more applicable to a class action mooted by an offer of complete relief than to an FLSA collective action.

Finally, there is no basis to give any weight to the discredited dicta from *Roper* that application of relation-back may be appropriate to prevent defendants from using settlements to "pick off" named plaintiffs before the class action has run its course. 445 U.S. at 339. To begin with, the Court has repudiated the legal significance of that portion of *Roper*, recognizing that it is only dicta. *Genesis Healthcare*, 133 S. Ct. at 1532. *Roper* is also distinguishable on its unusual facts, given that the plaintiff here (unlike the one in *Roper*) does not "assert any continuing economic in-

terest in shifting attorney's fees and costs to others." *Id.*

All that to the side, *Roper's* concern would be misplaced here. In this case, thousands of consumers are alleged to have received phone messages in violation of the TCPA, and any one of these individuals (if they actually exist, which is not reflected in the record) could bring a class action. And any one of them could file an individual claim and receive statutory damages likely far in excess of any actual damages they may have accrued—also likely far in excess of what they would receive in a class-action settlement. In the event that enough plaintiffs turn up, the defendant may come to prefer class certification, so as to put the claims against it to rest through a class-wide settlement. Unless and until that comes to pass, however, "picking off" plaintiffs by offering complete satisfaction of their asserted claims would most likely be to their and the defendant's mutual benefit.

In sum, there is no reason to expand the reach of the relation-back doctrine to reach class claims mooted by an offer of complete relief to the named plaintiff.

III. Recognizing a Right To Pursue Class Claims Would Raise Serious Constitutional Concerns Under Article III

The second question presented in this case—concerning the asserted ability of named plaintiffs, whose own claims have been found moot, to pursue claims belonging to other persons—raises essentially the same constitutional concerns as the respondent's claim to standing without factual injury in *Spokeo, Inc. v. Robins*, No. 13-1339. If the sole named plaintiff's claim becomes moot prior to class certification, the matter is no longer a proper "case" or "controversy" suitable for adjudication by an Article III court because the named plaintiff no longer possesses an unremedied injury in fact, irrespective of whether she might ultimately obtain an incentive payment—analogous to the statutory-damages remedy at issue in *Spokeo*.

In the main, mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997). This is, no less than standing, "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). *See also Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 190–91 (2000) (courts may not "retain jurisdiction over cases in which one or both of the parties plainly lack a con-

tinuing interest"). The "irreducible constitutional minimum" for a justiciable dispute is an "injury in fact" caused by the conduct complained of and likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560.

That requisite interest, however, "must consist of obtaining compensation *for*...the violation of a legally protected right." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (emphasis added). And that is what is lacking here, where the named plaintiff's right of compensation relating to her own injury has already been satisfied. "An interest unrelated to injury in fact is insufficient to give a plaintiff standing," *id.*, and therefore insufficient to overcome mootness. Accordingly, a named plaintiff whose own claim has been mooted stands in no better position than a plaintiff who has suffered no actual injury in fact.

Indeed, such a plaintiff has even less of a claim for Article III adjudication, because she lacks any cognizable remedy. While the named plaintiff might or might not receive an incentive award if the class is certified and settled, "the same might be said of someone who has placed a wager upon the outcome." *Id.* Such an interest is, at best, "merely a 'byproduct' of the suit itself," and therefore cannot support exercise of Article III power. *Id.* at 773.

These are, it must be remembered, structural limitations on the exercise of judicial authority. And it "is settled that Congress cannot erase Article III's standing requirements by statutorily granting the

right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). Thus, when the sole named plaintiff's claim becomes moot, adjudication of the action is outside the power of Article III courts, and no rule, statute, or judge-made doctrine may alter that result.

"In an era of frequent litigation [and] class actions...courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Wynn*, 131 S. Ct. 1436, 1449 (2011). The same holds true for the related doctrine of mootness. "Headless" class actions like this one, bereft of any interested plaintiff and therefore driven entirely by class counsel, raise an acute "risk of 'in terrorem' settlements." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). Strict adherence to the requirements of Article III helps to ensure that class actions are contained to their proper role of addressing common injuries and do not become an offensive weapon to extract windfall attorney's fees with little or no connection to the injuries for which Congress sought to provide redress.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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